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Supreme Court of the United States

OCTOBER TERM, 1963

No. 447

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

SUNFIRE COAL COMPANY, a corporation and
ASHLO COAL COMPANY, a corporation

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF

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INDEX

TABLE OF CONTENTS

	Page
Foreword	1
UMW's Reply to Companies' Arguments 1(a) and (b)	2
UMW's Reply to Companies' Argument 2	5
UMW's Reply to Companies' Argument 3	8
UMW's Reply to Companies' Argument 4	8
Conclusion	11

TABLE OF CASES

City of Knoxville v. *Bailey*, 6 Cir., 222 F. 2d 520, 529	6
Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696	2
Flame Coal Co. v. *UMWA*, 6 Cir., 303 F. 2d 39, cert. den. 371 U.S. 891	9
Gilchrist v. *UMWA*, 6 Cir., 290 F. 2d 36, cert. den. 368 U.S. 875	8, 9
Hotel etc. Employees Local Union No. 181 v. *Miller*, 272 Ky. 466, 114 S.W. 2d 501	9
Hurn v. *Oursler*, 289 U. S. 238, 246	9
Int. Union of Operating Engineers v. *Bryan*, 255 S.W. 2d 471, 474 (Ky.)	9
International Union, U.A.A. etc. v. *Bussell*, 356 U.S. 634	10
Local 3, Int. Bro. Elec. Workers, 144 NLRB No. 100, 54 LRRM 1178, 1181, fn. 2	3
Local 761, Int. Union of Electrical Workers v. *NLRB*, 366 U.S. 667	2, 3, 5, 7
Local Union No. 5895, United Steelworkers of America (Carrier Corporation), 132 NLRB 127, 130	2
Retail Clerks Union Local 770 v. *NLRB*, D.C. Cir., 296 F. 2d 368, 374	6

Page

Solomon v. *U.S.*, 6 Cir., 276 F. 2d 669, 674 7

Sprinkle v. *Davis*, 4 Cir., 104 F. 2d 487, 490 6

Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 26-27 7

Sweeney v. *City of Louisville*, 309 Ky. 465, 218 S.W. 2d 50 9

Tampa Electric Co. v. *Nashville C[illegible] Co.*, 365 U.S. 320 2

UMWA v. *Comer*, 159 Ky. 605, 167 S.W. 2d 891 9

UMWA v. *Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. den. 359 U.S. 1013 8, 9

UMWA v. *Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, cert. den. 364 U.S. 881 8, 9

United Construction Workers v. *Laburnum Construction Corporation*, 347 U.S. 656 10

Westchester Fire Ins. Co. v. *Hanley*, 6 Cir., 284 F. 2d 409, 413 6

STATUTES

Labor Management Relations Act, 1947:
Section 8 (b) (1) (A) [29 USCA 158 (b) (1) (A)] 10
Section 8 (b) (4) (A) [29 USCA 158 (b) (4) (A)] 6
Section 303 [29 USCA 187] 4, 6, 7, 9, 10

MISCELLANEOUS

Federal Rules of Civil Procedure:
Rule 51 6

Moore's Federal Practice—Rules and Official Forms, As Amended, 1963, p. 325 7

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

FOREWORD

UMW believes its statements of the case and of the evidence in the certiorari petition are both accurate and plenary. It believes, too, that the questions as presented in its petition raises the issues properly.

Further, because UMW believes that answers to arguments and statements advanced in Companies' opposition brief are to be found in the certiorari petition, no attempt will be made to reply, *seriatim*, thereto. However, the following discussions have relevancy to the Reasons

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The parties will be referred to herein as they were in the certiorari petition. The abbreviation "O.B." refers to Companies' opposition brief, while that of "Pet." refers to the certiorari petition herein and "Pet. App.)" refers to the appendix to that petition. References to pages in the certified appendix record are indicated as "—a". Unless otherwise indicated, all emphases herein are supplied

for Granting the Writ, at the same time challenging Companies' statements, arguments and positions.

UMW's Reply to Companies' Arguments 1(a) and (b).

Answers to Companies' contentions on Arguments 1(a) and (b) [O.B. 17-22, 23-26] are found in UMW's certiorari petition (pp. 29-33, 34-41).

While certiorari is generally not available to review a lower court decision turning *solely* upon an analysis of facts, it is available for reexamination and evaluation of evidence in light of previous decisions of this Court presenting important questions under federal statutes. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 696; *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320. Such is the present situation where, to sustain a secondary boycott charge supporting money judgments against UMW, the Sixth Circuit has wittingly ignored and refused to utilize criteria established by this Court's *Local 761* (366 U. S. 667), and has sanctioned a jury finding unsupported by evidence and based upon erroneous guides and standards of both union responsibility and liability, discussed in the certiorari petition under Reasons I through IV (Pet. 29-47).

Companies' statement (O.B. 18) that the Sixth Circuit disagreed with UMW's interpretation of this Court's *Local 761* is pure supposition, for the Sixth Circuit's opinion fails to mention *Local 761* despite UMW's argument thereof and its urging that the Sixth Circuit explain if or why it believed *Local 761* to be inapplicable (Pet. 31). Companies' effort (O.B. 18) to limit *Local 761's* applicability to peaceful picketing finds challenge in the Board's *Local No. 5895, United Steelworkers*, 132 NLRB 127, 130, fn. 2 (*now pending on certiorari in this Court as Case No. 925*) [Pet. 30-31].

Companies' effort to cast Companies in the role of a

"neutral" (O.B. 19), overlooks the undisputed fact that both Ashlo and Sunfire refused to sign the Agreement, some Ashlo employees were among the strikers picketing for higher wages via that Agreement (Pet. 32-33), and that Companies' Mathis attested to an attempt by pickets themselves on April 24, 1959, to have him sign the contract (36a). Companies' argument (O.B. 21) they were "neutral" as to other employers *from whom UMW contracts were sought*, just as contracts were sought from Companies, is challenged in UMW's Petition (p. 33). Picketing occurred at the sole entrance provided by Companies for proclaiming the union's dispute with them. If, as Companies urge (O.B. 7), there was picket misconduct toward employees at the Ashlo tipple, this would not "make the picketing secondary" but "emphasizes the *primary objective* of" the picketing. *Local 3, Int. Bro. Elec. Workers*, 144 NLRB No. 100, 54 LRRM 1178, 1181, fn. 12.

Companies' assertion "truckers were undoubtedly neutral" (O.B. 21) is not supported by the Sixth Circuit's opinion and further, as to truck drivers, the uncontradicted evidence is, as related by a District 30 representative, "we wanted them to know that we were on strike, wanted them to join up if they would, wanted them for members if we could get them for members, and we wanted contracts with the operators" (310a). Moreover, the coal brought by truckers to the Ashlo tipple was there processed, loaded in railroad cars, and then sold. Herein delivery of coal clearly related to these activities. As this Court's *Local 761* makes clear, even where secondary employees are involved, if the work performed is related to that of primary employees, there is no statutory violation (366 U. S. 681. "(A)ppealing to neutral employees whose tasks aid the employer's everyday operation" is "traditional primary activity" (366 U. S. 681).

Despite UMW's strong emphasis that implementation of *Local 761's* doctrine to the instant facts required re-

jecting the contention that UMW was guilty of conduct banned by Section 303, the Sixth Circuit's opinion was totally unconcerned and silent thereon.

Companies undertake (O.B. 23-26) to answer UMW's complaint, discussed under Reasons II and III of the certiorari petition (pp. 34-41), that the Sixth Circuit sanctioned a jury verdict of union responsibility and liability without regard to any agency relationship.[2] Disregarding inaccuracies and relevant factual omissions,[3] Companies' statement does not warrant a finding that UMW was responsible for any wrongful conduct. Whereas Companies point out that pickets Stubblefield and Fields were placed in charge by District 30's Combs (O.B. 23), and the record shows that Combs had "information that they were there practically every day" (309a), there is no evidence that any wrongful activity occurred in their presence. Nor does the statement show that Morris was an agent of UMW to warrant attributing to it the burning of the tipple even if Morris burned it (and UMW denies the evidence shows he did). Companies avoid mentioning the Sixth Circuit's admission that "The record discloses no positive evidence of the origin or the originators of the fire" (Pet. 15); and it is

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[2]Companies statement (O.B. 24) of the incident when a trooper stopped the car in which Morris and Turner rode "At 2:45 in the morning" omits the salient factors that they were not near the Ashlo tipple picket line, there is no showing the men were engaged in union activities, and the trooper conceded he did not regard the incident as sufficient to charge either (81a).

[3]Reference by Companies (O.B. 24) of threats by Turner toward truckers, testified to by driver Campbell (90a), fails to state the threat was made at a store a mile and a half from the tipple, as well as Campbell's admission Turner never attempted to harm him, no picket harmed him, and he delivered every load of coal he started with to the Ashlo tipple (90-2a), *as did the other drivers* (Pet. 16-18).

Companies carefully avoid Ruby Baker's admission (Pet. 14-15) of her receipt of cash from Companies' Mathis at the door to her hotel room, although she had never seen Mathis before, of free room and board at the hotel, and that Mathis got her the house in which she resided in Lexington. Nor do Companies undertake to explain why Mathis, sitting in the courtroom when Mrs. Baker, as a witness, thanked "the Good Lord" that someone had been "an angel" (209a), did not attempt to explain his liberality to Mrs. Baker.

notable that Companies do not attempt to answer UMW's complaint that the jury verdict they seek to uphold was premised upon trial court instructions which erroneously equated agency with union membership. Nor did Companies' opposition brief reply to UMW's demonstration (Pet. 34-38) that the trial court guides given to the jury were contrary to decisions of this and other federal courts and the National Labor Relations Board (Pet. 34-36), as well as to the Act's legislative history on agency (Pet. 34). Companies likewise did not undertake to reply to UMW's complaint that, contrary to such authorities, the Sixth Circuit has now created a pattern of "presumption of union responsibility" when acts occur at a time and place where union activity is involved, and so to destroy labor's right to strike by subjecting all strike activity to labor's economic peril (Pet. 38-39). Similarly, Companies do not respond to UMW's charge that the district court erroneously equated agency with union membership in admitting testimony of two doctors' employees (Pet. 36-37), as well as to an incident occurring May 14, after picketing ceased[1] when a trooper stopped the car in which Morris and Turner were riding (Pet. 37). Companies are careful also to ignore, in detailing the damages to other operators' property (O.B. 25), the undisputed facts that no testimony connected any UMW agent therewith and that Companies' witnesses admitted they did not know who had committed these acts (Pet. 25-26, 39). Companies do not deny this lack of identification.

UMW's Reply to Companies' Argument 2.

This Court in *Local 761* verbalized on the difficulty federal courts and the labor board have experienced in

[1]This incident is contained in Companies' statement (O.B. 24) as an incident to show that Morris and Turner were union agents; but the incident is not shown to have had any connection with any union activity, it did not occur on a picket line, and the Sixth Circuit's approval of the trial court's admitting this evidence was *not* on the basis of agency but whether "there was a concert of action between the two individuals" (Pet. 37).

interpreting Section 303. It was voiced also by Circuit Judge Prettyman in *Retail Clerk's Union Local 770* v. *NLRB*, D. C. Cir., 296 F. 2d 368, 374, when, referring to Section 8(b)(4)(A), he said: "*This case brings into focus the difficulties and complexities of administering this section of the statute.*" This demonstrates the positive necessity that a jury charge be given with utmost clarity, precision and completeness. Because Companies added a common-law violation to the complexities attending Section 303, it was vital that the trial court apprise the jury with the distinctions involved so that jurors would have been properly guided.

UMW's answers to Companies Argument 2 (O.B. 27-37) on the insufficiency of UMW's objections are found in its certiorari petition (pp. 41-47).

Companies ignore *City of Knoxville* v. *Bailey*, 6 Cir., 222 F. 2d 520, 529, where exceptions to the trial court's refusal to give special requests were held to meet the requirements of Rule 51, F.R.C.P.

While citing an early Sixth Circuit case holding objections insufficient, Companies ignore subsequent Sixth Circuit's cases sustaining objections where the point was called to the trial court's attention (Pet. 46). In *Westchester Fire Ins. Co.* v. *Hanley*, 6 Cir., 284 F. 2d 409, 418, counsel *merely noted an exception* to the trial court's failure to give requested instructions, yet the Sixth Circuit held it sufficient to save the court's refusal for review. Accord: *Sprinkle* v. *Davis*, 4 Cir., 104 F. 2d 487, where defendant requested, and the court refused an instruction, the appellate court declared, "It is manifest that the objection of the defendant to the charge, as originally prepared, and *the instruction requested*. . .. were sufficient to direct the mind of the court to the legal principle, and to require that a correct instruction be given

. . . " (p. 490). See also *Solomon* v. *U. S.*, 6 Cir., 276 F. 2d 669, where objection was raised when motion for new trial was filed [Pet. 45].

Companies' brief contains no response to UMW's citation of this Court's *Sunkist Growers, Inc.* case (379 U. S. 19, 26-27) [Pet. 46], where counsel had requested instructions refused by the trial court, this Court rejected a contention that objections were waived. Similar silence attends other Sixth Circuit cases (Pet. 47) where that Court evidenced concern because the jury had been improperly charged on material issues. Herein, as to UMW, the Sixth Circuit evidenced no such concern.

Though UMW complained in its petition of the trial court's failure to delineate the criteria enunciated in *Local 761* as essential in holding a labor union guilty of conduct proscribed by the Act Section 303 (Pet. 43-44), Companies' profession that the charge sufficed is to be tested *by their failure to denote specific language covering this vital factor, even in substance.*

Where, as here, there is error in the court's charge, and even though no timely or proper instruction were made—which UMW denies—"the court's error in instructing on a material issue may be the basis for grant of a new trial *. . . when it is apparent that a miscarriage of justice may otherwise occur*". Moore's Federal Practice—Rules and Official Forms, as Amended 1963, p. 925.

In addition to the foregoing errors in the court's jury charge, in the certiorari petition (pp. 34-35, fn. 26) UMW demonstrated that the Sixth Circuit's approval of the jury verdict resulted from permitting the jury to predicate UMW's responsibility and liability upon union members' conduct and thus to equate such membership with agency. Further discussion of such error appears herein

(*ante*, pp. 4-5) where it is pointed out that Companies have not attempted to answer UMW's complaint concerning such error. Had UMW's proffered Instruction No. 2 (to which refusal UMW noted its objections [34a] been granted, this error would not have occurred.

UMW submits that where, as herein demonstrated, UMW responsibility and liability have been based upon erroneous standards and guides, a miscarriage of justice has occurred, thus emphasizing the importance of a review herein.

UMW's Reply to Companies' Argument 3.

UMW's answer to Companies' Argument 3 (O.B. 37-8) is found in the certiorari petition (pp 28, 47-48).

UMW's Reply to Companies' Argument 4.

Answers to Companies' contentions in their Argument 4 (O.B. 39-45) are found in UMW's certiorari petition (pp. 48-55).

Companies incorrectly state (O.B. 39) that the jurisdictional question was disposed of in the *Meadow Creek* and *Osborne* cases[1] since neither concerned a common-law claim in a state which, like Kentucky, would not permit a labor union to be used as such. Even in *Gilchrist*,[2] activities occurred both in Tennessee wherein a union may be sued and in Kentucky, in which it may not be sued, but *Gilchrist* did not discuss the issue.

Companies inaccurately urge (O.B. 40) that voluntary unincorporated associations are considered legal entities

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[1] *UMWA v. Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. den. 359 U. S. 1013; *UMWA v. Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, cert. den. 364 U. S. 881.

[2] *Gilchrist v. UMWA*, 6 Cir., 290 F. 2d 36.

in Kentucky.[6] It is noteworthy that Companies fail to reply to UMW's citation (Pet. 52, fn. 39) of *Sweeney* v. *City of Louisville*, 309 Ky. 465, 218 S. W. 2d 30, which rejected an action brought against an association as such.

Companies quote at length from the Sixth Circuit's *Flame* case[7] (O.B. 40-42) in which reliance is had upon *Meadow Creek*, *Osborne* and *Gilchrist*; but such cases did not deal with UMW's contention that federal preemption precludes federal district court jurisdiction of the state common-law tort claim under the doctrine of *Hurn* v. *Oursler* (289 U. S. 238). Since Companies press the district court's jurisdiction of the common-law claim under *Hurn* v. *Oursler*, 289 U. S. 238, a concomitance of consideration must be this Court's reasoning that *Hurn* is justified where both federal and nonfederal claims "so precisely rest upon *identical facts* as to be little more than the equivalent of different epithets to characterize the same group of circumstances" (289 U. S. 246). By enacting Section 303, Congress precluded a nonfederal, state claim or action based on such facts. Nothing contained in Companies' opposition brief explains why this Court's rule of federal preemption does not preclude the implementation of the *Hurn* doctrine.

Companies contend (O.B. 43) that the question of preemption was considered and disposed of contrary to

[6] Companies' reliance upon *Int. Union of Operating Engineers* v. *Bryan*, 255 S. W. 2d 471, 474 (Ky.), *UMWA* v. *Comer*, 159 Ky. 605, 167 S. W. 891, and *Hotel etc. Employees Local Union No. 181* v. *Miller*, 272 Ky. 466, 114 S. W. 2d 501, cited by Companies (O.B. 40) are not supportive of Companies' contention.

In *Operating Engineers*, the court decided only that a non-resident union could be required to produce documents by service of a subpoena duces tecum directed to a resident officer and union representative under the class action statutes (255 S. W. 2d 474).

In *Comer*, there was no objection to the suit by special demurrer or special pleas in abatement for which reason the court permitted judgment to stand.

In *Hotel Employees*, the question of suability was not before the court, which found the union made an appearance to the suit by motion to modify an injunction order.

[7] *Flame Coal Co.* v. *UMWA*, 6 Cir., 303 F. 2d 39, cert. den. 371 U. S. 891.

UMW's contention in the *Laburnum* and *Russell cases.*[*] Significantly, in its certiorari petition (pp. 49-51), UMW's reasons for *Laburnum's* inapplicability are delineated, and Companies do not answer UMW's contention that, unlike *Laburnum*, which involved the Act's Section 8(b)(1)(A), wherein this Court rejected the preemption doctrine because the Act "sets up no general compensatory procedure", Section 303 specifically so provides. Like *Laburnum*, *Russell* was a state court action; neither involved the issue of diversity of citizenship which is lacking here. Like *Laburnum*, *Russell* held federal preemption inappropriate because the federal act involved did not provide a remedy for recovery of damages for the activities proscribed. Section 303 does so provide, and the Supreme Court so noted in *Laburnum*, declaring (347 U. S. 665):

> "One instance in which the Act prescribes judicial procedure for the recovery of damages caused by unfair labor practices is that with reference to the jurisdiction of federal and other courts to adjudicate claims *for damages resulting from secondary boycotts. In that instance the Act expressly authorizes a recovery of damages.* . . ."

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[*] *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656; *International Union U.A.A. etc. v. Russell*, 356 U. S. 634. UMW's reply to Argument 4 applies also to Companies' citation of *Laburnum* and *Russell* under their Argument 2 (O.B. 37) as to UMW's proffered Instruction 5. Moreover, as the certiorari petition notes (Pet. 14), Instruction 5 would have informed the jury that violence is immaterial in a Section 303 charge.

CONCLUSION

For the reasons discussed herein and in the certiorari petition, the writ prayed for therein should issue.

Respectfully submitted,

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